Filed 12/10/03 P. v. Watkins CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JAMES BRIAN WATKINS, Defendant and Appellant.	E032985 (Super.Ct.No. FSB024203) (Orange Co. 99CF2736) O P I N I O N

APPEAL from the Superior Court of Orange County. Steven L. Perk, Judge. Reversed.

Law Offices of Randall S. Waier for Defendant and Appellant.

Michael A. Ramos, District Attorney, Grover D. Merritt, Lead Deputy District Attorney and Lance A. Cantos, Deputy District Attorney for Plaintiff and Respondent.

Defendant and appellant James Brian Watkins (defendant) appeals from a trial court's denial of his petition for a finding of factual innocence under Penal Code[1] section 851.8. We shall reverse the trial court's order denying defendant's petition.

FACTUAL AND PROCEDURAL HISTORY

In October of 1999, the San Bernardino County District Attorney's Office charged eight individuals, including defendant, in a 59-count felony complaint. Defendant was charged with 41 felony counts: conspiracy to commit grand theft, grand theft, arson, insurance fraud, conspiracy to commit tax fraud, money laundering, conspiracy to obstruct justice, filing false instrument, conspiracy to falsely bring suit, conspiracy to wiretap, eavesdropping, conspiracy to stalk, stalking, assault with deadly weapon, conspiracy to assault with deadly weapon, and resisting an executive officer. All judges in San Bernardino County recused themselves, and the case was transferred to Orange County.

After an extensive preliminary hearing in this case, on March 15, 2000, the trial court found insufficient evidence to believe that any of the 41 crimes (including enhancements) alleged in the complaint had been committed by defendant. Therefore, defendant was not held to answer on any of the charges. The other defendants, however, were held to answer on the charges.

---

[1] All statutory references are to the Penal Code unless otherwise specified.

Thereafter, defendant filed a petition for a finding of factual innocence and for sealing and destruction of arrest records under section 851.8 (the petition). The People filed an opposition to the petition. The trial court denied the petition.

In denying the petition, the trial court found that defendant had established his initial burden of demonstrating that no reasonable cause existed to believe that defendant had committed the offenses charged in the complaint.

Defendant appeals.

ANALYSIS

I. The Trial Court Erred in Denying Defendant's Petition Under Section 851.8

A. Legal Background

Section 851.8 sets forth the procedure and standard of proof for sealing and destroying the arrest records of a person who is factually innocent. Where a person was arrested and an accusatory pleading filed, but no conviction occurred, the defendant may ask the court that dismissed the action for a finding that he is factually innocent of the charges for which the arrest was made.[2] A trial court may make a finding of factual innocence only if it finds that no reasonable cause exists to believe the defendant

---

[2] Section 851.8, subdivision (c), states:

"In any case where a person has been arrested, and an accusatory pleading has been filed, but where no conviction has occurred, the defendant may, at any time after dismissal of the action, petition the court which dismissed the action for a finding that the defendant is factually innocent of the charges for which the arrest was made. . . . The district attorney may present evidence to the court at such hearing. Such hearing shall be conducted as provided in subdivision (b). If the court finds the petitioner to be factually

[footnote continued on next page]

committed the offense for which the arrest was made.[3] The moving or petitioning defendant bears the initial burden of proving that no reasonable cause exists to believe that he committed the charged offense.[4] The defendant must establish that facts exist that would lead no person possessed of ordinary care and prudence to believe or conscientiously entertain any honest and strong suspicion that he is guilty of the crimes charged.[5] The factual innocence standard required for the extraordinary relief provided by section 851.8 is not satisfied where there is merely insufficient proof to meet the reasonable doubt standard or even the preponderance of evidence standard.[6] The court may consider any material, relevant and reliable evidence, including otherwise inadmissible matters such as police reports and evidence previously suppressed under sections 1538.5 and 1539.[7]

[footnote continued from previous page]
innocent of the charges for which the arrest was made, then the court shall grant the relief . . . ."

[3] Section 851.8, subdivision (b), states:

". . . A finding of factual innocence and an order for the sealing and destruction of records pursuant to this section shall not be made unless the court finds that no reasonable cause exists to believe that the arrestee committed the offense for which the arrest was made. In any court hearing to determine the factual innocence of a party, the initial burden of proof shall rest with the petitioner to show that no reasonable cause exists to believe that the arrestee committed the offense for which the arrest was made. If the court finds that this showing of no reasonable cause has been made by petitioner, then the burden of proof shall shift to the respondent to show that a reasonable cause exists to believe that the petitioner committed the offense for which the arrest was made."

[4] Section 851.8, subdivision (b).

[5] *People v. Matthews* (1992) 7 Cal.App.4th 1052, 1056.

[6] *People v. Adair* (2003) 29 Cal.4th 895, 909.

[7] Section 851.8, subdivision (b).

B. Standard of Review

Although we should defer to the trial court's factual findings to the extent they are supported by substantial evidence, we must independently examine the record to determine "whether the defendant has established 'that no reasonable cause exists to believe' he or she committed the offense charged. [Citation.]"[8]

C. A Dismissal of the Charges Against Defendant After a Preliminary Hearing Does Not, as a Matter of Law, Support a Finding of Factual Innocence Under Section 851.8

Defendant contends that the trial court should have granted his motion based on the trial court's order at the preliminary hearing that defendant not be bound over for trial: "[Defendant] does not claim innocence after being acquitted as the Prosecution misleadingly argues; rather, [defendant] claims innocence after the trial court made a factual finding that that there was no reasonable cause to believe him guilty of any felony after a preliminary hearing. This finding is identical to that required for a finding of innocence. [Citation.]" In essence, defendant argues that the trial court, "by ruling in favor of [defendant] at the preliminary hearing and dismissing the case, subsequently was bound to rule in favor of his factual innocence petition." We disagree with defendant's interpretation of section 851.8.

Under defendant's interpretation of section 851.8, any time a trial court dismisses a defendant from charges after a preliminary hearing, that defendant would be entitled to

a finding of factual innocence. Neither the plain language of the statute nor its legislative history support this interpretation.

The plain language of section 851.8 does not stand for the proposition espoused by defendant. It does not state that a finding of factual innocence is required if a defendant is not held to answer at his preliminary hearing. Under section 851.8, subdivision (b), defendant -- as the petitioner -- has the initial burden to prove that no reasonable cause exists to believe that he committed the charged offenses. There is no such burden of proof placed on defendant at a preliminary hearing. The trial court may make a finding of factual innocence under section 851.8, however, only after the petitioning defendant has met the burden imposed by the statute.

In the recent Supreme Court decision in *Adair*, the court reiterated that, "[b]y its own terms, section 851.8 precludes the trial court from granting a petition '*unless* the court finds that *no reasonable cause exists* to believe' that defendant committed the offense charged. [Citation.] In other words, the trial court cannot grant relief if *any* reasonable cause warrants such a belief."[9] The Supreme Court compared this analysis with section 871, stating that "at [a] preliminary hearing, [a] magistrate shall order the complaint dismissed if 'it appears . . . that no public offense has been committed or that there is not sufficient cause to believe the defendant guilty of a public offense.'"[10] As the

---

[footnote continued from previous page]

[8] *People v. Adair, supra,* 29 Cal.4th 895, 897.

[9] *People v. Adair*, *supra*, 29 Cal.4th 895, 904.

[10] *People v. Adair*, *supra*, 29 Cal.4th 895, 904.

Supreme Court has recognized, both sections 851.8 and 871 have similar standards of review. This, however, does not lead to the conclusion that a dismissal under section 871 automatically leads to a factual finding of innocence under 851.8. The Legislature would have made this clear under section 851.8 if it were so. It did not.

In fact, the legislative history of section 851.8 is contrary to defendant's interpretation of that section. The Supreme Court described section 851.8's history in *Loder v. Municipal Court*:[11]

"As introduced on January 18, 1975, the bill which ultimately enacted Penal Code section 851.8 (Sen. Bill No. 299, § 1) provided for mandatory sealing of arrest records in all cases in which the defendant was released without charge for insufficient evidence, or the charge was dismissed -- i.e., for any reason -- without a conviction, or he was acquitted. An amendment to the bill on May 12, 1975, however, conditioned such relief on specific findings by the court that the interests of justice require sealing and there is not a preponderance of evidence establishing the defendant's guilt. Finally, an amendment to the bill on May 29, 1975, deleted the foregoing provisions in their entirety and substituted the present scheme of permitting sealing only in cases in which the defendant is acquitted *and* it appears to the judge that he was 'factually innocent.'"

This glimpse into the legislative history demonstrates that section 851.8 initially mandated a finding of factual innocence when a charge against defendant was dismissed "for any reason." However, the Legislature specifically chose not to adopt this language,

and instead, opted for the current version of section 851.8, which mandates that a judge make a separate finding of factual innocence. This legislative history, therefore, supports the plain wording of the statute and directly contradicts how defendant would like us to interpret section 851.8.

D. Defendant Has Met the Initial Burden of Proving That No Reasonable Cause Exists to Believe That He Committed the Charged Offenses

Since a dismissal of the charges against defendant after a preliminary hearing does not, as a matter of law, support a finding of factual innocence under section 851.8, we must next determine whether defendant met his burden of proof under that section: Defendant must establish that facts exist that would lead no person possessed of ordinary care and prudence to believe or conscientiously entertain any honest and strong suspicion that he is guilty of the crimes charged.[12]

The People argue that defendant has failed to meet this burden simply because defendant relies on the dismissal of his charges after the preliminary hearing was held. We disagree. We must conduct a de novo review of the petition. Defendant's petition stated as follows:

"My petition is supported by the lengthy preliminary hearing transcript in this proceeding, of which I request the Court to take judicial notice [ ], all evidence adduced

---

[footnote continued from previous page]

11 *Loder v. Municipal Court* (1976) 17 Cal.3d 859, 876, footnote 21.

12 *People v. Matthews, supra,* 7 Cal.App.4th 1052, 1056.

at that preliminary hearing, and any further evidence as the Court may require at the time of the hearing of this petition."

Therefore, we must review the transcript from the preliminary hearing in its entirety -- defer to the trial court's factual findings to the extent they are supported by substantial evidence, but independently examine the record to determine whether defendant established that no reasonable cause exists to believe that he committed the offenses charged.[13]

After reviewing 20 volumes of the reporter's transcripts of the preliminary hearing, which occurred from February 15, 2000 through March 15, 2000, we find that no reasonable cause exists to believe that defendant committed any of the offenses charged in the complaint.

In this case, the law firm of Watkins and Watkins, which was run by defendant and his father, John Watkins, represented Steven Oleesky in a family law/child custody matter in San Bernardino, California. The lawsuit was between Mr. Oleesky and his ex-wife, Claudia Oleesky, regarding the custody of their son. Although Mr. Oleesky was the firm's client, the evidence was clear that he was primarily the client of John Watkins, not defendant. During the course of the firm's representation of Mr. Oleesky, he and his girlfriend and, eventually, new wife, Denise, allegedly engaged in numerous illegal activities. Some of the alleged illegal activities included: (1) purchasing donated goods from a food bank allegedly on behalf of a non-profit entity and then re-selling the goods

for personal profit; (2) making fraudulent claims to insurance companies after suspicious fires on properties owned by the Oleeskys; (3) committing tax fraud; (4) money laundering; (5) wiretapping Claudia Oleesky's home; (6) hiring private investigators to stalk Claudia Oleesky and her friends; and (7) sanctioning the use of force by the private investigators against Claudia Oleesky and her friends to cause intimidation. As a result of these alleged illegal activities, the People charged defendant, John Watkins, Steve Oleesky, Denise Oleesky, and three of their private investigators in 59-count indictment. One of the private investigators, Jeff Crawford, agreed to cooperate with the prosecution shortly after his arrest.

At the preliminary hearing, the court found that there was reasonable suspicion to believe that many of the alleged crimes had been committed – and held Steve Oleesky, Denise Oleesky, John Watkins, and the two investigators to answer the charges alleged against them. As to defendant, however, the court stated as follows:

"As it relates to the defendant Brian Watkins, the Court finds there is *insufficient evidence* to believe that the crimes alleged in Counts 1 through 59 have been committed as alleged, and that the enhancement, there is insufficient evidence on the enhancement, and that those Counts then, 1 through 59 and all enhancements are dismissed, and the defendant [is] discharged. Bail is exonerated." (Italics added.)

As stated above, after reviewing the transcripts of the preliminary hearing, we agree with the trial court and hold that defendant has met his burden of establishing that

---

[footnote continued from previous page]

13 *People v. Adair*, *supra*, 29 Cal.4th 895, 897.

no reasonable cause exists to believe that defendant committed any of the offenses charged in the complaint. In the transcripts, the witnesses revealed John Watkins was the attorney who represented Mr. Oleesky in his various alleged illegal dealings. Defendant, who was John Watkins' son and partner, participated in some meetings with the other defendants. However, there was no evidence presented, whatsoever, that defendant took an active role – either as an advisor or attorney – in any of the alleged illegal activities.

The People, however, argue that defendant cannot be found factually innocent because Crawford, one of the private investigators working for Mr. Oleesky, testified that defendant "knew Claudia Oleesky's phone messages were being intercepted [citation]; and that [defendant] was also aware covert video surveillance equipment was being used to observe Claudia Oleesky in her apartment. [Citation.]" Although defendant may have been *aware* about the phone message interception and surveillance equipment – there was absolutely no testimony from any of the witnesses that defendant advised or encouraged anyone to employ such surveillance tactics, or that defendant actively participated in this behavior. All that the testimony showed was that defendant may have been aware that such acts were occurring. In fact, the same witness testified that during a meeting discussing such surveillance tactics, defendant did not actively participate; he was simply "in and out" of the meeting. Defendant never gave any of the private investigators any advice on what should be done.

Moreover, the People argue that defendant cannot be found factually innocent because defendant "was present at strategy discussions discussing Judge Wade and his

improper recusal. [Defendant] and others present at that meeting were laughing over the strategy and [defendant] declared that such strategy would work. [Citation.]" Again, the People's argument is without merit. All that this testimony showed was that defendant participated in a "meeting" in a doorway of the law firm where the participants discussed a lawsuit against Judge Wade to recuse him from the Oleesky matter. This in no way shows that defendant participated in the filing of the lawsuit or assisted any of the other defendants in pursuing the lawsuit. No one had stated that defendant either represented or counseled Mr. Oleesky regarding the possible Wade lawsuit.

Furthermore, the People argue that defendant cannot be found factually innocent because defendant "signed four consecutive checks payable from his law firm trust account to pay a co-defendant for surveillance activities. [Citation.] All of the checks were written on the same day for amounts just under $10,000. [Citation.]" Thereafter, the People jump to the conclusion that "[a]ll of such facts were indications of money laundering in which [defendant] participated. [Citation.]" Again, the People's argument is without merit. Section 186.10, subdivision (a), entitled "money laundering," states as follows:

"Any person who conducts or attempts to conduct a transaction or more than one transaction within a seven-day period involving a monetary instrument or instruments of a total value exceeding five thousand dollars ($5,000), or a total value exceeding twenty-five thousand dollars ($25,000) within a 30-day period, through one or more financial institutions (1) with the specific intent to promote, manage, establish, carry on, or

facilitate the promotion, management, establishment, or carrying on of any criminal activity, or (2) knowing that the monetary instrument represents the proceeds of, or is derived directly or indirectly from the proceeds of, criminal activity, is guilty of the crime of money laundering. . . ."

Here, all that the prosecution established was that defendant signed the four checks, totaling approximately $40,000, from the law firm's trust account to pay one of the private investigators working for Mr. Oleesky – at the direction of Mr. Oleesky. There was absolutely no evidence presented that defendant had the "specific intent" to engage in any criminal activity or that defendant knew that the money was derived from the proceeds of criminal activity. Defendant was simply dispersing funds from a client's trust account at the direction of a client. Again, the prosecution failed to produce any evidence that defendant was involved in a money laundering scheme.

In fact, all that the evidence showed was that defendant was a partner in the law firm of Watkins and Watkins, and that his law partner and father, John Watkins engaged in criminal activity with the Oleeskys. The evidence showed that defendant may have participated in some of the meetings wherein the Oleesky matters were discussed. Absent, however, from the evidence was defendant's participation in any of the alleged illegal activities. The witnesses testified that defendant may have made some appearances on behalf of his father at court, and knew about events that were occurring. In no way do such facts make defendant guilty of crimes.

Therefore, based on our review of the transcripts from the preliminary hearing, we hold that facts exist that would lead no person possessed of ordinary care and prudence to believe or conscientiously entertain any honest and strong suspicion that defendant is guilty of the crimes charged.

E. The People Have Failed to Rebut Defendant's Claim of Factual Innocence

Next, the burden shifts to the People. We must determine whether the People presented evidence to rebut defendant's claim of factual innocence under section 851.8, subdivision (b). "[A]ny judicial determination of factual innocence made pursuant to [section 851.8, subdivision (b)] may be heard and determined upon declarations, affidavits, police reports, or any other evidence submitted by the parties which is material, relevant and reliable."[14]

In its opposition to the petition, the People included an affidavit of an investigator, Felts, in support of a search warrant made *after* the preliminary hearing dismissal of charges against defendant. Defendant contends that this post-preliminary hearing evidence should be inadmissible in considering his petition. We need not decide that issue on this appeal because, even if we were to consider that affidavit, we find that the People failed to rebut defendant's claim of factual innocence.

In the affidavit, Felts stated that defendant had knowledge about the surveillance equipment in Claudia Oleesky's home. Moreover, tapes of the surveillance were kept at the law firm. Felts also stated that Mr. Oleesky had told Felts that defendant "knew of,

agreed to, and contributed to an arrangement between Oleesky and [one of the private investigators] to sue Judge Wade falsely in order to force the latter to recuse himself from the *Oleesky v. Oleesky* action."

With regard to defendant's knowledge of the surveillance of Claudia Oleesky, we fail to see how this "knowledge" can prove that defendant committed the multitude of charges that the prosecution alleged in the complaint. As discussed above in section I.D., it does not.

Moreover, the complaint provided to Felts by Mr. Oleesky – after he agreed to cooperate with the prosecution and entered an open guilty plea – that defendant participated in the lawsuit against Judge Wade is not helpful to the prosecution. First, the evidence is inadmissible hearsay as to defendant. Second, the existence of a conspiracy cannot be established against an alleged co-conspirator without corroboration from a non-conspirator.[15] Therefore, we fail to see how this evidence can be considered *reliable*, as required under section 851.8, subdivision (b), as against this defendant.

After an extensive preliminary hearing – the People utterly failed to provide any evidence that could connect defendant with the 41 counts alleged against defendant in the complaint. In its opposition to the petition, the People similarly failed to provide any incriminating evidence.

[footnote continued from previous page]

14 Section 851.8, subdivision (b).

15 See *Jones v. Superior Court* (1979) 96 Cal.App.3d 390, 396; Evidence Code section 1223.

Therefore, we find that the trial court erred in denying defendant's petition.

DISPOSITION

The trial court's order denying defendant's petition for a finding of factual innocence under section 851.8 is reversed. The trial court is ordered to grant defendant's petition.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

/s/ Ward
J.

We concur:

/s/ Hollenhorst
Acting P.J.

/s/ Gaut
J.